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HAROLD B. WI

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

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## No. 308

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WALTER BITTERLING, *Petitioner*,

v.

MAPLE ISLAND FARM, INC., *Respondent*.

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## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Walter Bitterling, petitioner, prays that this Court grant a rehearing of its order of November 15, 1954, denying the petition for a writ of certiorari filed by him in this Court on August 27, 1954. Petitioner further prays that upon a rehearing and reconsideration a writ issue to review the judgment of the United States Court of Appeals for the Eighth Circuit as prayed for.

## REASONS FOR GRANTNG A REHEARING AND ISSUING THE WRIT

The decisions of this Court in *United States* v. *Oregon State Medical Society,* 343 U. S. 326, *United States* v. *United Shoe Mach. Co.,* 247 U. S. 32, 41, and *Adamson* v.

*Gilliland*, 242 U. S. 350, 353 (Pet., pp. 19, 20), affirmed the long-standing concept that in non-jury cases trial judges are the sole judges of credibility of witnesses giving testimony in their presence. This Court has never cast any doubt on or qualified this fundamental rule. If this rule be subject to qualifications, this Court should define them for the guidance of lower Federal Courts and for counsel.

Rule 19(b) of this Court reserves to this Court the broad power of supervision with respect to departures by courts below from the ordinary course of judicial proceedings.

This case presents the collateral, but equally important, question whether the rules of this Court and its prior decisions actually control the conduct of courts below in the course of judicial proceedings or are mere general declarations of sound legal principles which lower courts may apply or ignore with impunity on the assumption that in dealing with ordinary litigation they are immune from review.

It is assumed that the conduct of courts below with respect to the proper scope of appellate review, and specifically to review of the credibility of witnesses, is not too unimportant to deserve the careful attention of this Court. Otherwise, the declared rules of judicial proceedings will, in practice, apply not to all citizens alike, but only to those having an unusual status or claims of sufficiently remarkable or unusual character as to excite the attention of this Court.

Absent review of the conduct of courts below which depart from the historic and declared course of correct judicial procedure as to credibility, the rules of this Court forbidding such departure become meaningless, and Rule 52, F.R.C.P. becomes a convenient facade behind which any court below, so disposed, may flaunt the law in a specific case, by giving lip service to the declared rule, in recitals of "clearly erroneous" and "firm conviction." If this is true, Rule 19(b) becomes an unenforceable declaration of

a sound legal principle, the importance of which is chiefly historical and academic.

An experienced trial judge over many weeks of trial found that one litigant told the truth and another testified falsely, with knowledge of that falsity. The court below, without pointing to a single specific reason or error, adopted that false witness and rejected the testimony of the witness found to be reliable. A measure of the impact of this judicial arbitrariness is found in the fact that its decision leaves petitioner without any compensation for his services and deprives him of more than $75,000.00 which he spent in its performance of his employment!

Strictly speaking, the application and enforcement of Rule 19(b) will require this Court to pass on only a narrow question:[1] Did the court below reverse the trial court on the credibility of the two key witnesses? Accordingly:

1. The review of this case will not require this Court to resolve questions of conflict of evidence or decide the *weight* of the evidence.

2. The review of this case will require this Court to determine only whether the claimed contracts rested on and were controlled by oral testimony of two opposing key witnesses.[2]

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[1] Petitioner's reservation of additional points to be urged if certiorari was granted may suggest that an extended review of evidence is involved. This, however, is not the case. The reserved questions involve primarily questions of law *and facts not in dispute*. Furthermore, should this Court so desire, it can limit its grant to only those questions whose reiew it deems appropriate.

[2] The determination of this question is rendered relatively simple by the respondent's affirmative admissions in its opposition brief (pp. 11, 17, 18) that the case rested solely on the oral testimony of Hadrath and petitioner. This leaves only the question of whether the court below had the power and right to pass on this issue.

For the reasons stated here and in the petition and reply to respondent's opposition brief, and on the admissions of respondent that all petitioner's claims rested on oral testimony, petitioner respectfully requests that this petition for rehearing and reconsideration be granted, and, upon rehearing, his petition for a writ of certiorari be reinstated and granted.

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